No. 18664

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Appellant,

vs.

DOUGLAS OIL CO. OF CALIFORNIA, a corporation,

Appellee.

APPELLEE'S BRIEF.

GOGGIN, TOLLEFSEN & BUMB,
Suite 1200,
816 West Fifth Street,
Los Angeles 17, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18664

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Appellant,

vs.

DOUGLAS OIL CO. OF CALIFORNIA, a corporation,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT AND HISTORY OF THE CASE.

Appellant Monolith, as purchaser, entered into a fuel oil sales contract in July, 1957 with Appellee Douglas, as seller. The contract was a minimum-maximum quantity contract extending through May, 1958. Default occurred at the end of November, 1957 by the refusal of Monolith to accept certain quantities of oil which it was then obligated to purchase. However, further correspondence took place between the parties and the first clear cut indication that Monolith intended definitely to breach the contract was in March, 1958 [R. 76].* This action was filed in May, 1958 for re-

*For convenience and to avoid confusion, we will use the same designations of the record as Appellant set out in footnote, p. 1, of its brief.

covery of damages resulting from the breach and the cause was removed to the Federal District Court because of diversity of citizenship.

Trial of the case was commenced in February, 1960 and consummed approximately six court days. Judgment was entered by the District Court on April 20, 1960 finding for the plaintiff and awarding damages of approximately $134,000 and costs of suit. In its conclusions of law immediately preceding the judgment the District Court stated:

> "That plaintiff is entitled to judgment in the sum of $132,448.16, without interest until the date of entry of judgment; and in the sum of $1,202.18, with interest at the rate of 7% per annum from March 1, 1958; and for costs of suit." [R. 94].

The item of $1,202.18 represented the contract price for oil purchased and received by the defendant in February, 1958, for which payment was not made, and upon which payment was due on March 1, 1958; and the balance of the judgment was damages for the failure of Monolith to accept the contract quantities of oil which it was obligated to purchase under the terms of the contract.

Monolith appealed to this Court and the trial court's judgment was originally affirmed on January 18, 1962. Monolith requested a rehearing and although the rehearing was denied, the original opinion of this Court was amended on May 16, 1962 to reallocate certain

quantities of defaulted oil to the months of October, 1957 through February, 1958, and to then state that "the judgment is reversed for proceedings consistent with this opinion." (303 F. 2d 176, 182).

Pursuant to the mandate or judgment of this Court, the trial court ordered that the case be reopened for the limited purpose of taking evidence of sales of fuel oil during the months of October and November, 1957 [Clk. Tr. 56]. Subsequently on October 15, 1962, a hearing was held at which evidence was introduced for the specified purpose, and on November 30, 1962, the District Court made and entered its revised judgment awarding damages to Douglas in the sum of $114,038.64 (a reduction of approximately $20,000 from the original amount of the judgment), together with interest at the rate of 7% per annum on the sum of $79,668.98 from April 20, 1960 (the date of entry of the original judgment), and upon the balance from the date of the entry of the revised judgment. The method of arriving at these amounts is set forth in the memorandum accompanying the revised judgment [Clk. Tr. 120].

The present appeal is prosecuted from the revised judgment after denial of Monolith's motions to amend the findings and for additional findings, for a new trial, and to alter or amend the revised judgment.

II.
QUESTIONS RAISED BY APPEAL.

In Monolith's summary statement of the case (Br. 5) it states that "The basic questions presented by this appeal are whether the District Court correctly followed the mandate and whether Monolith was denied a fair hearing below under this Court's view of the law." From this statement and the specifications of errors contained in Appellant's brief, it appears that the questions to be determined on this appeal are essentially the following:

1. What is the proper construction and effect of the mandate of this Court following the first appeal?
2. Whether the Court below properly followed the mandate, and in so doing, whether the trial court abused its discretion or failed to afford Monolith a fair hearing.
3. Whether the Court below erred in refusing to again consider the contention that Douglas had failed to mitigate its damages, after previously having held that Douglas had fulfilled any duty which it may have had to mitigate damages, and after this Court had affirmed the ruling of the trial court at the first appeal.
4. Whether the findings as to market value and the contract price in the opinion of the Court below are clearly erroneous as being unsupported by the evidence.

III.
SUMMARY OF ARGUMENT.

A. The substance and effect of the mandate and opinion of the Appellate Court, and not merely a single word used, controls the subsequent action of the trial court upon remand. It is incumbent upon the trial court to construe the mandate and opinion together in a reasonable manner so as to take the action which he is directed to take "consistent" with the Appellate Court's opinion and to accomplish that which he is instructed to accomplish by the Appellate Court's order.

B. In this instance the trial court correctly determined that the plain effect of the mandate and opinion was not to disturb the findings and the judgment previously entered with respect to the damages to be awarded on the quantity of oil which he previously had properly allotted to the period of March-May, 1958, and that the substance of the Appellate Court's order was to require, and to require *only,* the shifting of some 62,266 barrels of defaulted oil to the months of October, 1957—February, 1958, and the determination by the trial court from evidence already before him, or additional evidence if that before him should be insufficient for this purpose, the damages attributable to this particular defaulted quantity. No action by the District Court was required or was necessary as to the determination of damages for the remainder of the defaulted oil, which had already been properly allotted to the pe-

riod March-May, 1958, excepting the clerical task of computing the dollar amount of these damages on the basis of the findings previously made.

Further, the trial court rightly concluded that since the judgment as to the proper quantity of defaulted oil for the period March-May, 1958 was not disturbed by the Appellate Court decision, interest on this portion of the damages was allowable under 28 U. S. C. Section 1961 from the date of the entry of the original judgment. This interest is not only appropriate but mandatory under the federal statute which applies to interest on federal judgments, and is in no sense "pre-judgment interest."

C. The District Court properly exercised the limited discretion given him in the matter of assessing the damages for the default with respect to the oil allotted to the months of October, 1957—February, 1958 by consulting the record and determining that there was sufficient evidence in the record before him for the determination of the market value and contract price for the period December-February and ordering the reopening of the case for the limited purpose of receiving evidence of market value for the period of October-November, 1957. In this connection Appellant was afforded a fair hearing and an opportunity to offer and introduce all evidence considered by it to be relevant for this purpose. The reopening of the entire issue of damages for further evidence, as requested by Appel-

lant, would have exceeded the authority given the trial judge by the mandate and would have been an abuse of the limited discretion provided therein.

D. The issue of mitigation of damages was litigated at the original trial and made an issue on the original appeal in this cause and was determined adversely to Appellant in both instances. Hence the attempted revival of this issue is foreclosed since the previous rulings are the law of the case.

E. The findings of the District Court, from which it made its calculations of damages as to the various defaulted quantities of oil at the times that such quantities should have been taken, are fully supported by substantial evidence and the calculations thereof are in accordance with the applicable law of the State of California.

IV.

ARGUMENT.

1. The District Court Properly and Correctly Construed and Determined the Effect of the Appellate Court's Mandate.

A. The Mandate and Opinion Are to Be Construed Together in a Reasonable Manner to Determine the Substance and Effect of the Appellate Court's Action.

In its opinion on revision of judgment [Clk. Tr. 85], the trial court, after reviewing the authorities stated as follows:

> "Accordingly, in the instant case I interpret the Court of Appeals' mandate as a modification and not as a reversal as to a portion of the judgment. As I understand the opinion, it was the view of the Appellate Court that the lower court had erroneously included in the computation for damages for the months of March, April and May, 1958, 64,200 barrels of oil which should have been spread back for the computation of damages according to a table submitted by the plaintiff in answer to interrogatories and footnoted in the opinion at page 181.
>
> "It is my view that the Court of Appeals did not intend to disturb the judgment as to the 90,000 barrels which were in default for the months of March, April and May, therefore, interest shall be allowed on the amount of damages for that period from April 20, 1960, the date of the entry of the original judgment."

In opposition, Monolith contends that this Court's use of the word "reversed" indicated that the judgment entered April 20, 1960 was to be completely vacated and set aside and could have no further force or effect for any purpose.

First, Monolith quarrels with the District Court's opinion that the effect of the mandate is controlled by federal law inasmuch as it concerns the construction of a judgment of a federal court. It contended in the court below, and Douglas initally concurred, that California law should be controlling because this was a diversity case. However, it now seems apparent to us that the District Court was entirely correct in this respect. Monolith's argument goes along the line that in diversity cases the substantive law of the state is to be applied. With this we agree. So far as we are aware, however, none of these cases extends this principle to the point that after the federal court has correctly applied the substantive law of the state, the state law controls the *effect* of the federal court judgment. See *Lee v. Terminal Transport Co.* (7th C. 1962) 301 F. 2d 234, in which it was held that once the federal court has taken jurisdiction in a diversity case, the state law cannot control the course of the federal litigation. In the prior opinion (282 F. 2d 805) it was stated that once the case is before the federal court, its jurisdiction encompasses all aspects of the case.

Monolith also objects to the District Court "interpreting" the mandate. Since, as in the case of receipt of any order, it is encumbent upon the court to read and ascertain its meaning, it is not clear to us why the District Court's action in doing just that is con-

sidered objectionable by the Appellant. Apparently the Supreme Court of the United States does not consider this to be improper for as said in *Kneeland v. American Loan & Trust Company* (1891), 138 U. S. 509 at 511:

> ". . . on receiving our mandates the Circuit Court *interpreted* them as in effect affirmance of as much of the decrees as allowed these amounts to the intervenors, and its new decrees awarded interest thereon from the date of the former decrees." (emphasis supplied),

and the Supreme Court upheld the "interpretation" of the mandate by the Circuit Court.

The opinion of the Appellate Court is a part of the mandate where there is direction in the mandate to proceed consistently with the opinion. *United States v. Panamerican Petroleum Co.* (S. D. Calif. 1927), 24 F. 2d 206; *Great Northern Ry. Co. v. General Railway Signal Co.* (8th C. 1932), 57 F. 2d 457. The mandate is to be construed reasonably. *Wilkinson v. Massachusetts Bonding & Insurance Co.* (5th C. 1926), 16 F. 2d 66. Perhaps the use of the word "construe" would be more apt than "interpret", but in either event the District Court is under duty to consult both the mandate and the opinion in construing the mandate to ascertain its substance and effect. *Ohio Oil Co. v. Thompson* (8th C. 1941), 120 F. 2d 831, cert. den. 314 U. S. 658.

The mandate, including the opinion with which the District Court was admonished to comply, must, as any document, be read and interpreted or construed reasonably so as to determine its substance and effect. If the District Court were to ignore its substance, by

reason of the form or the language used, it would be neglecting its plain duty.

Under the federal law, the substance rather than the form or the language used in a judgment governs its effect. This is a principle of long standing application in the federal courts. In *Kneeland v. American Loan & Trust Co., supra,* the court stated at 511-512:

> "We think the ruling of the Circuit Court was correct. The amount of the allowances for these five months was separately stated, and such allowances were sustained by this court. While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet, the terms of those new decrees were specifically stated, and insofar as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance. Equity regards the substance and not the form. *The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial.* Equity looks beyond these words of description to see what was in fact ordered to be done. Illinois Central Railroad v. Turrill, 110 U.S. 301." (emphasis supplied).

In *Ex parte Columbia* (1904), 195 U. S. 604, which Appellant characterizes as one of the "elderly cases" referred to by the District Court in its opinion on revision of judgment, the trial court's judgment was *reversed* and the cause remanded with directions to enter a decree confirming the award for and up to a specified

sum. Upon objection being made to the allowance of interest from the date from which interest was awarded in the original decree of the Circuit Court, the Supreme Court through Justice Holmes stated that by confirming the award as to some of the items, which in its opinion it stated were treated as separate matters, some of which may be disallowed without affecting the rest, it had in effect declared that these should have been paid on the date specified in the original award and said at 605:

> "To that extent the decree below stood approved; and as no disapproval was expressed of the consequence attached by that decree to the failure to pay, it is impossible to say that there was an implied prohibition of again attaching the same consequences in the new decree."

See also *Rector v. Massachusetts Bonding & Insurance Co.* (CCA-DC 1951), 191 F. 2d 329, 331 in which the court said:

> "The cases indicate, however, that a partial reversal does not necessarily carry with it the conclusion that a judgment has not been affirmed. Instead the tendency has been to consider a judgment affirmed unless it is 'wholly reversed' or at least 'substantially reversed' by the appellate court."

And further at 332:

> "Even a technical designation of reversal will not discharge liability on a bond conditioned upon affirmance *if the facts demonstrate a partial affirmance.*" (emphasis supplied).

The same principle is recognized and followed as well by the courts of California, for in the latest pro-

nouncement of the Supreme Court of that state in *Stockton Theatres, Inc. v. Palermo* (1961), 55 Cal. 2d 439, 11 Cal. Rptr. 580, the court said *with respect to its own mandate* which had "reversed" the trial court's judgment, that

> "This 'reversal' obviously was, in law and in fact, a modification. When the facts are considered in their entire context this conclusion is inescapable.
>
> . . .
>
> "Although the order in that case was couched in terms of a reversal with directions, *it had the legal and practical effect of* modifying the original award." (pp. 443-444, emphasis supplied).

B. The Substance and Effect of Mandate Was to Affirm the Judgment as to Damages for the Reduced Quantities of Defaulted Oil for the Months of March, April and May, 1958.

A review of this Court's opinion and mandate indicates, as the District Judge concluded, that the substance thereof was that the April 20, 1960 judgment was merely modified, or reversed in part and affirmed in part, rather than being rendered *functus officio* as Appellant contends. "What was in fact ordered to be done," and *all* that was ordered to be done, was that the District Judge was instructed to compute the damages due Douglas with respect to the 64,266 barrels of defaulted oil which the Appellate Court held to have been erroneously included in the computations for the months of March, April and May, and should have been allotted to the preceding months of October through February, and to receive further evidence for this limited purpose if he deemed it necessary.

In regard to the trial court's interpretation of the contract as a maximum-minimum contract and its determination that it had been breached and that there was no legal excuse therefor, this Court said, "We agree with that judgment." (303 F. 2d 176, 180). The disposition of the trial court of the issues of fraud, mistake, custom, accord and satisfaction, etc. was upheld. It was only in respect to the damages that any difference of opinion was expressed by the Appellate Court and this was limited to the proper manner of computing the damages because the trial court "allotted too much of the breaches to the last three months." (Idem, 181-182).

On this prior appeal, the findings of the trial court as to the contract price and the market value for the oil which Monolith was obligated to purchase during these three months of March, April and May were not attacked and were not disturbed. The only question involving these findings which was raised on the prior appeal was whether the court had correctly applied the California law of damages (Appellant's Opening Brief on first appeal, p. 4). This question had nothing to do with the sufficiency of the findings as to the contract price or the market value, and the argument was directed to claimed errors in the determination as to the defaulted quantities, mitigation of damages, and applying the market value for March to quantities which Appellant claimed should be allotted to the prior months. Neither the amount nor the allowance of interest on the February deficiency were put into question.

It thus appears from this Court's opinion that the only real difference between the Appellate Court and

the trial court in this matter was the determination by this Court that the trial court had allotted too much of the defaulted oil to the last three months. This was the matter to be corrected upon the remand. This is what the District Judge considered that he was ordered to do and this is what he did. His action is now claimed as error, denial of a fair trial, denial of due process, and an abuse of discretion by Appellant on this appeal.

The Appellate Court stated in its opinion, after indicating its disagreement in regard to the time at which certain quantities of the oil had been adjudged to be in default, that "If the trial court deems it better to reopen the case to receive further evidence to enable it to make *its computation of the damages* within this court's view of the law, it should feel free to do so. Obviously, the scope of such inquiry would be rather limited." (303 F. 2d 176, 182). This statement was "interpreted" by the District Judge, as well as by us, as meaning that the Appellate Court did not intend to disturb any part of the findings or the judgment which did not involve the quantities of defaulted oil which were reallotted to the months of October through February. The judge was given some discretion to reopen the case to receive further evidence if he felt it necessary to enable him to make the necessary computation of damages with respect to that particular quantity of defaulted oil. He was, however, admonished that the scope of any such inquiry should be rather limited. This statement was taken, we believe, by the District Judge as indicating that if the record before him was sufficient for him to make a new computation of the dam-

ages arising from the default as to the quantities now allotted to October through February, he should so do from the evidence in the record, and if the evidence before him was not considered to be adequate for that particular purpose, he could and should reopen the case for the limited purpose of taking evidence from which he could determine the market value of that oil at those times.

This, again, is exactly what the District Judge did. He examined the record to determine for what period of time during these particular months the evidence already before him was not in his opinion sufficient to make the determination required under the mandate. He concluded that evidence of market value during the months of October and November, 1957 was necessary and hence reopened the matter for presentation of such evidence. In his opinion on revision of judgment [Clk. Tr. 86] he says:

> "It was my view that there was sufficient evidence in the record to make a determination of market value for December, 1957 as well as January and February, 1958. (See Summary of evidence of sales page 12, appendix to defendant's opening brief filed in the Court of Appeals) However, inasmuch as there was no evidence in the record of sales during the months of October and November, 1957 the motion was granted to the extent only of reopening the case to take such evidence."

We submit that the action of the District Judge was entirely appropriate and in full conformity with the direction from this Court to him in its mandate. The

language of the opinion referred to his "computation of the damages within this court's view of the law," (303 Fed. 2d 176, 182). Since the Appellate Court's view of the law and the District Court's view of the law differed *only* as to the times at which 64,266 barrels of the defaulted oil should have been taken, the only reasonable meaning to be attributed to the "limited inquiry" which the District Court was authorized to make was as to the amount of the damages accruing on the quantitites of oil which had been held by this Court to have been allotted in the wrong months.

The fact that the Appellate Court did not truly reverse the case on the issue of damages, and that this was neither the substance nor the effect of the mandate, is further supported by the statement in the Appellate Court's opinion that "We give Monolith less than it basically contends for in the reduction of damages" (Idem, 182). This statement was taken by the trial court and by ourselves as additional indication that in substance the damage issue was affirmed excepting insofar as it related to the oil which was held to have been improperly allocated to the last three months of the contract.

The propriety of the view taken by the District Court and of its subsequent action is indicated by *Gaines v. Rugg,* 148 U. S. 228, in which the Supreme Court, on a second appeal, stated as follows regarding its action on the first appeal (p. 238):

> "Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction,

> as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. *It did not disturb the findings and decrees* of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they use the word 'reversed' amount to a reversal only in respect of the accounting and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects." (Emphasis supplied.)

It has been suggested that the proper procedure for Appellee to have followed was to file a motion to recall the mandate. Since the opinion and mandate were considered by Appellee as being clear, no need for such a motion seemed indicated. Appellee could see no reason under the circumstances to further prolong this already extended litigation by making such a motion, having it determined, and postponing the trial court's compliance with the mandate for such further period of time as might be required for the hearing and disposition of the motion. If Appellant was unable to discern the substance and effect of the opinion and felt it might be prejudiced by subsequent action of the trial court, it had the same right within a reasonable time, to file a motion for recall of the mandate so that its meaning could be clarified for Appellant's benefit.

The avoidance of interest for approximately 2½ years on a substantial portion of the damages originally awarded, is of course the principal object of Mono-

lith's present appeal, and as indicated above, its argument in that regard is one of semantics based upon the use of the word "reversed" by this Court in its mandate, with no consideration being given by Appellant as to the substance, effect or proper construction of what that mandate directed the District Court Judge to do or what it meant to accomplish.

C. The Trial Court in Its Revised Judgment, Properly Included Interest From the Date of the 1960 Judgment on That Part of the Damages Which Was Not Disturbed on the Prior Appeal.

Despite the insistence of Monolith in referring to the interest provided for in the revised judgment as "pre-judgment interest," there was never any pre-judgment interest allowed either in the 1960 judgment or in the revised judgment other than interest on the underpayment of approximately $1,200 for the February deliveries of oil from the time it became due on March 1, 1958. This interest item has not actually ever been questioned and is entirely appropriate under the California statute (Civil Code Sec. 3287), since the February deficiency resulted from deliveries of oil for which payment was made at less than the agreed contract price. It has no relation to the issue of damages for default in refusing to purchase oil under the contract.

With respect to the damages for default in refusing to purchase oil that Monolith was obligated to purchase under the contract, the trial court made a finding that the market value at the time and place such oil should have been accepted was not well established and hence, under the California law, refused to allow any "pre-judgment" interest on these damages. The

characterization of the interest problem on the present appeal as being one of the award of "pre-judgment interest" is therefore quite inappropriate. In the revised judgment there was likewise no allowance of "pre-judgment" interest on the damages which the court found, upon remand, to be assessable with respect to the 64,266 barrels of oil which he was instructed to allot to the months of October-February. Pursuant to the instruction of this Court, the District Judge made his determination as to the contract price and market value of this particular oil for each of such months and entered judgment for those damages and *provided that interest upon such damages would be payable only from the date of the entry of the revised judgment.*

With respect to the damages previously determined to have resulted from the failure to accept defaulted oil during the months of March, April and May, and with respect to the February deficiency, the District Judge provided in the revised judgment that these amounts would bear interest from the date of the entry of judgment on April 20, 1960, since this portion of the judgment and the findings upon which it was based, were not disturbed or altered in any way by the decision on the first appeal. It is emphasized that the interest on this portion of the damages is not in any sense "pre-judgment interest," aside from the single item of the February deficiency.

While the question of pre-judgment interest depends upon the state law in a diversity case, post-judgment interest depends upon the Federal Interest Statute (28 U. S. C. Section 1961). This statute provides that interest shall be allowed on any money

judgment in a civil case recovered in a federal court and that such interest shall be calculated from the date of the entry of the judgment at the rate allowed by state law. We submit that this is the only interest which the District Judge has allowed, again excepting interest on the February deficiency, and that he has complied precisely with the applicable federal statute. In fact, the District Judge had no discretion or alternative but to allow such interest since the statute makes the award of post-judgment interest mandatory. *Moore-McCormack Lines v. Amirault* (1st C. 1953), 202 F. 2d 893.

The distinction to be made between pre-judgment interest, and interest on a federal judgment is very aptly expressed in *Moore-McCormack Lines v. Amirault, supra.* In that case the court considered the claim that pre-judgment interest had been erroneously allowed, and after setting forth the contentions of Appellant under the federal interest statute and of the Appellee under the state statute, the Court said at 895:

> "In considering these opposing contentions, distinction must be made between (1) the running of interest upon a judgment debt from the date the judgment was entered to the date of payment, and (2) the allowance of pre-judgment interest to be included as an item of damages in the total amount of an ensuing money judgment, in order that plaintiff may be more fully and justly compensated for the wrong complained of. The latter may be regarded as a part of the substance of the claim sued upon, for which a money judgment is sought.
>
> . . .

> "28 U. S. C. Section 1961 belongs in category (1) above. . . . The purpose was simply to provide that money judgments of federal courts should bear interest from the date of the entry of the judgment, collectible in the same way and at the same rate as provided in the local state law for the allowance of interest on money judgments recovered in the state courts. Interest upon the amount of a money judgment rendered by a federal court runs automatically, by the mandatory provision of 28 U. S. C. Section 1961, even though the judgment itself—as in the case at bar—contains no specific award of such interest."

In further clarification the court said also at 895:

The apparent confusion as to the interest properly due on the undisturbed portion of the judgment is created by the failure of Appellant to recognize this distinction. Practically, it may be that there is no real difference in result since the law of California relative to the allowance of interest on judgment from the date of entry is the same (See 3 Witkin, California Procedure p. 1921 and cases there cited).

However, so that the question can be clearly and squarely presented to this Court, our position is that we do not make any claim for pre-judgment interest other than the interest awarded with respect to the February deficiency. What we do claim is interest from the date of the entry of the original District Court judgment in respect to the damages properly assessable for the refusal of Appellant to take the quantities of oil which, under the contract, were properly allocable to the months of March, April and May, 1958.

We make no claim to pre-judgment interest as to the further amount of damages to which the District Court has determined that we are entitled for the defaults occurring in the prior months of October-February. We do claim interest on these amounts from the date of the entry of the revised judgment, and this is all of the interest that the revised judgment provides thereon. Our claim to interest on the damages for the defaulted quantities of the months of March, April and May, 1958 is based upon the award of damages for these defaults by a federal judgment entered April 20, 1960 and our construction of this Court's mandate, with which construction the trial court concurred, that the "reversal" on the original appeal in this case did not deny us these damages or reopen the question of the computation of the damages which resulted from Appellant's default in these months.

Appellant further obscures the real question by referring to the principle that a party cannot be chargeable with interest unless he could have determined with reasonable certainty the amount payable and thus have been able to make a proper tender to the creditor (Br. 23-24). This however is a mere recitation of the general rule which is codified by the California Civil Code defining the instances in which *pre-judgment interest* is allowable. It has absolutely nothing whatsoever to do with the allowance of interest after entry of judgment and certainly has no application to the matter of when interest is allowed on a federal judgment. When a judgment is entered, the debtor knows the extent of his obligation. If the judgment is appealed and affirmed, he has known it all along. If the judgment

is appealed and modified, reduced, or affirmed only in part, he also has known of his obligation *to that extent.* If the judgment is actually reversed, he is correct and has had no obligation. In this latter case he has no interest liability. In all of the former cases, he has liability for interest from the date of the entry of the judgment as to all or that portion of which he has not been relieved. He cannot escape his obligation for interest merely by appealing and thereafter contending, somewhat as Appellant contends here, that until the appellate court has made its determination, the debtor is not able to determine the full extent of his responsibility. The situation is analogous to the untenable claim that interest is not allowable on a judgment until the date on which post-judgment motions are determined adversely to the debtor, *Litwinowicz v. Weyerhaeuser Steamship Co.* (E. D. Pa. 1960), 185 Fed. Supp. 692.

If a federal judgment is modified, interest on the judgment is payable, under the Federal Interest Statute, from the date that the judgment was entered, and similarly if a portion of a money judgment is affirmed, interest is likewise payable on the portion thus affirmed, from the date of the entry of the original judgment.

Rule 24(1) of this Court provides that

> "In actions at law where an appeal is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered."

If we are correct in construing the mandate as affirming the judgment for damages as to the last three months of the contract, there should be no question that under this rule, interest would be payable on this undisturbed portion of the judgment from the date of its entry on April 20, 1960. *Swartzbaugh Mfg. Co. v. United States* (6th C. 1961), 289 F. 2d 81, 85, supports this view, the court there saying:

> "The fact that a judgment or decree (including chancery cases where the Appellate Court hears the matter de novo) is reduced on appeal does not prevent the exaction of interest upon the reduced amount from the date of the original judgment or decree" (citing cases).

See also *Litwinowicz v. Weyerhaeuser Steamship Company* (E. D. Pa. 1960), 185 Fed. Supp. 692, in which as to one party a new trial was granted, limited to the issue of damages, unless a remittitur was filed. With respect to the matter of interest after remittitur, it was stated at 693:

> "In the Matyas case, of course, interest would accrue on the judgment as reduced by the remittitur, from the date of the entry of the judgment for the greater amount. This judgment was not vacated, but simply modified by reduction in amount by the plaintiff's remittitur. The position of the parties is precisely the same as though the verdict and judgment had been for this reduced sum. The situation is analogous to that in which an Appellate Court reduces a judgment. As plaintiff points out, the reasoning applied by the court in allowing interest on the judgment as reduced from

> the date of original entry is that the revision of the judgment is a partial affirmance. (*Ex parte Colombia,* 195 U. S. 604; *Kneeland vs. American Loan,* 138 U. S. 509). Whether the judgment or decree below be reduced or increased, interest is allowed on so much thereof as can be said to be 'affirmed' by the Appellate Court, from the date of original entry. *Harris vs. Chicago Great Western Railway Co.,* 7th Cir. 1952, 197 Fed. 2d 829; *Chemical Bank & Trust Company vs. Prudence-Bonds Corp.,* 2 Cir. 1954, 213 Fed. 2d 443."

It should also be remarked that this is not a case of reversal because of excessive damages. A determination of damages pursuant to statutory rule cannot be "excessive" and obviously such determination cannot be considered to have been given "under the influence of passion or prejudice." In this case the damages awarded with respect to the oil held to be properly allotted to the period March-May were computed by the trial court in accordance with the rule prescribed by the applicable California statute. The fact that it was subsequently held that certain quantities of oil had been incorrectly allotted to this period of default, does not make excessive the damages which were awarded with respect to the proper quantities for this period. The reduction in the total judgment which has resulted from further proceedings comes about merely from a reallocation of a portion of the oil to a different period of time and the application of the statutory formula to that quantity at that time. Significantly, no claim was made of "excessive damages" as the basis for the original motion for a new trial [R. 97] or on

the first appeal, and, of course, there was no ruling by this Court that the damages were "excessive" in the legal sense.

The problem thus gets back again to the basic question of the effect of the mandate in the present action. If the trial court has been correct in its construction of the mandate, interest is payable from the date of the entry of the judgment of April 20, 1960 as to the defaulted quantities of oil which were held to be in default during the months of March, April and May, 1958, and not re-allotted to the prior months of October-February pursuant to this Court's opinion.

Monolith contends that the case of *Briggs v. Pennsylvania Railroad* (1948), 334 U. S. 304, precludes this allowance of interest since the mandate here made no express reference to the question of interest. While there appears to be some confusion among the Circuit Courts in regard to the proper application of the *Briggs* decision, it has no application here, where the substance and effect of the mandate was not a reversal, but an affirmance, of the damages with respect to the defaulted oil for March-May, 1958. The *Briggs* case actually stands merely for the proposition that the lower court is bound by and must follow the mandate of the Appellate Court. If the District Judge exceeded the limits of authority and discretion given him by the present mandate, the *Briggs* case principle would come into play, but it is submitted that the authority and discretion given him was not exceeded, and the District Judge in fact complied explicitly with the terms of the mandate. In the *Briggs* case there was a judgment of dismissal which was appealed and this judgment was reversed. There was a

true reversal, and in fact there was previously no judgment entered which provided for interest or upon which interest could have been allowed. The case held that upon such a reversal, interest would not be allowed upon the new judgment until the date of its entry.

In our case, interest is already provided for in the judgment either through the application of the Federal Interest Statute or by the conclusion of law in which the District Court indicated that Appellee was entitled to interest from the date of entry, and unless it is now held that the mandate on appeal wholly reversed this judgment, the judgment, including the provision for interest, continued as to the undisturbed portion thereof from the date of its entry which was April 20, 1960.

Appellant attempts to distinguish the *Kneeland* and *Ex parte Colombia* and *Stockton Theatres v. Palermo* cases, referred to previously, on the basis that a specific dollar amount money judgment was ordered to be entered by the lower court and says that although the term "reversed" was used in the Appellate Court mandate in each case, this was a typical "modification." Thus Appellant seems to agree that the principle which we urge, *i.e.,* that the substance and effect of the mandate, including the opinion of the court as necessarily included by the language which required the trial court to take "proceedings consistent with this opinion," is correct.

We are unable to perceive any legal or practical difference between the affirmance of the judgment as to the March-May defaulted quantities (recognizing that the quantities originally allotted to these months were ordered to be reduced to some extent) with direction

to the trial court to make "its computation of damages within this Court's view of the law," and an order by the Appellate Court directing a reduction in these damages by a specified dollar amount. The necessary findings as to market value and contract price from which these damages were readily ascertainable, had already been made and these findings were, in effect, sustained. Hence there was nothing required of the trial court in respect to these quantities other than to make the computation. The actual computation of these damages by the appellate court would have added nothing, and it must be assumed that the same mathematical answer would have resulted from the computation whether it was performed by the Appellate Court or by the District Judge.

2. The District Court Properly and Correctly Followed the Mandate, and Did Not Abuse the Discretion Given It Therein, and Did Not Fail to Afford a Fair Hearing or Fair Trial to Monolith.

Monolith complains of the lack of a fair trial and even of a denial of due process before the trial court at the hearing following the issuance of the mandate. It refers to the fact that the trial court did not agree with the Appellate Court's opinion as seemingly to indicate that the trial court attempted in some manner to nullify the effect of the partial reversal. It states that the judge arrived at a judgment of approximately the same amount as the April 20, 1960 judgment, which is not at all correct, since the ultimate principal amount of the revised judgment was some $20,000 less than that originally found to be due. It goes

further to remind the court that it is improper to change interest from a means of compensation to a coercive or punitive measure thus implying that in some manner the District Judge arrived at his conclusion as a means of coercing or punishing the Appellant.

So far as these assertions are concerned, we will stand strictly on the record, which we believe indicates that Appellant was afforded full, complete and even an excessive opportunity to present all of the evidence which it desired and which it had any reason to believe supported its case. The District Court at the original trial heard all of the evidence that Appellant wished to produce on any issue, much of it over the objection of Appellee, and the judge extended every opportunity for it to present its case. In fact, as was observed by the Appellate Court in its opinion, "The greatest latitude in proof was indulged. . . ." (303 F. 2d 176, 180) and indicated that the great mass of this evidence might better have been confined to an offer of proof.

There is not the slightest indication anywhere in the record that the trial court permitted its original view as to the proper allocation of the defaulted oil quantities to influence it after remand, or that Appellant was treated unfairly, or that the judge consciously or unconsciously attempted to negate the effect of the Appellate Court's decision and mandate. Any such inference is entirely out of place. Likewise, the trial court's determination of the interest question can, in no manner, be construed as an attempt to punish or penalize Appellant. As stated before, the Federal Interest Statute is mandatory, and hence the court is bound to

follow it and Appellee has a vested right to the compensatory effect of its proper application.

Following the issuance of the mandate, the Appellant filed a motion to reopen the entire case as to the issue of damages [Clk. Tr. 14-34]. The refusal of the trial court to do so is assigned as error in denying Monolith a fair hearing. There had been no order, request for order, or any apparent reason for permitting a piecemeal trial of the action. Actually, under the limitations imposed by the mandate, the reopening of the entire matter as suggested by Appellant, would have been a gross abuse of the discretion of the trial court. See *Southard v. Russell* (1853), 57 U. S. 547; *In re Gamewell Fire-Alarm Tel. Co.* (1st C. 1896), 73 Fed. 908; *City of Orlando v. Murphy* (5th C. 1938), 94 F. 2d 426.

The case of *McClure v. O'Henry Tent & Awning Company* (1951), 192 F. 2d 904, seems particularly in point. In this case the Appellate Court in a previous appeal affirmed the judgment as to one contract in question and reversed as to another and remanded for further proceedings as to the question of damages only. Following this remand the defendant moved to be allowed to introduce additional evidence. The trial court entered judgment, without hearing additional evidence, based upon the evidence in the record. The Appellate Court disposed of the defendant's assignment of error by saying at 905:

> "We cannot agree with defendant's contention that the court was compelled to hear additional evidence upon the remand of the cause. As we stated, the evidence as to a fact vital to the decision of the

cause was in dispute, and it was the duty of the trial court to resolve that dispute. That does not mean that a new trial was necessary. Of course, had the court desired to hear additional evidence on the issue, it was free to do so under our mandate. But it appears from its disposition of the cause that it was satisfied that there was sufficient evidence of record upon which to base its findings and that further hearing was unnecessary."

In *Franklinville Realty Co. v. Arnold Construction Co.* (5th C. 1943), 132 F. 2d 828, the case had been partially reversed and the cause remanded for further proceedings in conformity with the opinion of the Appellate Court, which opinion said that the reversal was limited to the presentation of evidence as to whether or not certain labor and services were used in a construction job. The appellant contended there, as Appellant contends here, that the limited reversal was a complete reversal setting at large all of the issues previously determined and that the trial court erred in limiting the proceedings. The Appellate Court held that the District Court had correctly interpreted the mandate and fairly and correctly reheard and determined the issue on which *alone* the case had been remanded, stating that upon that issue the appellant had been permitted to offer all relevant proof.

Similarly in the *Kneeland* case, *supra,* the appellant had moved in the Circuit Court, after the filing of the mandate, to have the matter of the amounts due to each party referred to a master for investigation and this motion was denied. The denial was claimed

as error. The court said in this regard at 138 U. S. 513:

> "Counsel claims that under the reversal the whole matter of inquiry as to the accounts was opened. On the contrary, the clear language of our decision was to strike out certain specific items and allow others as already fixed. *No new investigation was contemplated in respect to past matters.*" (Emphasis supplied.)

Appellant insisted that the case should have been reopened upon the entire issue of damages because of "newly discovered evidence," [Clk. Tr. 91, 125], and complains of the order limiting the reopening for the purpose of receiving evidence of market value for the months of October and November, 1957.

Appellant made quite a point in the trial court of the fact that it had "discovered" that there were eight refineries in the Bakersfield area during the contract period rather than five or six as some of the witnesses had indicated in their testimony (Br. 41), and mentions that there was no previous evidence of sales of six of the refineries "constituting 75% of the sellers in such market" (Br. 51). The implication of these statements is obvious but the misleading effect is not. Upon the limited reopening of the case by the trial court, the facts were discovered to be that one of the supposed refiners (West Coast Oil Company) was actually a brokerage firm which made only limited sales of fuel oil, and that three of the refineries (Mohawk, Palomar, and Golden Bear) either had not produced or had made no sales of Bunker C fuel oil. This left Standard Oil Company of California, Sunland Refining

Corporation, Bankline Oil Company (now Signal Oil & Gas Company), and Douglas. So that in actual fact there were four refineries selling the product at the time in question, and the evidence introduced at the trial showed the sales of both Bankline and Douglas as well as the posted price of Standard Oil, which is the published price at which it offered to sell its products to prospective purchasers. Thus the only refinery in the area as to which no evidence of price or sales was developed at the original trial was that of Sunland Refining Company. In this respect, however, there was evidence by Mr. Hand, a witness presented by Monolith, that he had purchased oil from Bankline and Sunland during the period from January through May, 1958 at prices of $1.55 per barrel in January, 1958 through March 25, 1958, and $1.20 per barrel for the remainder of the applicable period of time [R. 434-435]. As these prices were below the prices at which Bankline sold oil [Ex. 71], it seems that Mr. Hand's testimony must have pertained to his purchases from Sunland.

Monolith had been in business for a number of years in the particular area and was constantly using fuel oil, and, as said in Appellant's opening brief on the first appeal in the footnote on page 52: "Appellant was the only substantial potential oil purchaser in the Bakersfield area in July, 1957." Its purchasing agent testified that she kept in touch with the market [R. 311] and even professed to do so with respect to the fuel oil market in the Los Angeles Basin [R. 326, 327], even though Monolith was located in the Bakersfield area and hence was normally supplied from that area. In view of this evidence, it seems incongruous

that Monolith did not know of the available fuel oil suppliers who would be able to give pertinent evidence as to market value in that market area at the time of the original trial or was ignorant of the going market prices for oil. Also it cannot be accepted that Appellant or its counsel was without knowledge of the means by which it could obtain the court's process to present any evidence which it might desire, particularly since it did use subpoenas to present the evidence of market value which it felt helpful at the original trial and used the same process to obtain evidence at the reopened hearing.

As a matter of fact the true reason that the court's process was not sought and this supposedly helpful testimony was not presented at the trial was the firm conviction of the Appellant that it would be held not to be liable for its disregard of its contract obligations, and its hope that the question of damages might therefore never be reached [Clk. Tr. 128].

3. There Was No Error in the District Court's Refusing to Again Consider the Previously Determined Issue in Regard to Mitigation of Damages.

At the original trial the Appellant continually contended that the Appellee was under a duty to mitigate its damages and had failed in that duty. The court in its order denying Monolith's first motion for a new trial [R. 98-99], and its conclusions of law [R. 94] held that the plaintiff fulfilled any duty which it may have had to mitigate damages. This ruling was upheld on the first appeal, this Court stating: "Monolith claims that Douglas failed to mitigate its damages.

That was the burden of Monolith to prove. The trial court was evidently not satisfied with its proof." (303 F. 2d 176, 182). It would seem that nothing further need be said in this regard since this established the law of the case.

Monolith attempts to reopen this issue by asserting that the trial court's conclusion was reached on the basis of an inaccurate view of the time at which various defaulted quantities of oil should have been taken, and contending that Douglas could have and should have taken action to realize a greater amount from the defaulted oil in the earlier months. However, as the trial court stated in its opinion, "There was no clear-cut indication that the defendant definitely intended to breach the contract until March 10, 1958." [R. 76]. Thus, sofar as the question of mitigation is concerned, the situation was the same as that which the trial court considered at the original trial.

In any event, as this Court noted, the burden was upon Appellant to show facts disclosing a failure to mitigate damages, which in this instance would require a showing that there was a market available to Appellee for the defaulted oil, at the time it became in default and at a price in excess of the then prevailing market price. Appellant has failed to show any circumstances or means by which Appellee could have lessened the damages which it suffered. Further, the controlling statutory provision in regard to mitigation of damages is California Civil Code Section 1784(4) which in essence provides that if the buyer repudiates a contract or notifies a seller to proceed no further therewith, the buyer shall be liable "*for no greater damages*" than the seller would have suffered "*if he*

did nothing toward carrying out the contract" after receiving notice of the repudiation or countermand.

In this case the measure of damages adopted by the court, and ostensibly approved upon appeal, was the difference between the market value and the contract price at the time that each particular quantity of defaulted oil ought to have been taken, as provided by California Civil Code Section 1784(3). Thus it is quite apparent that no *greater* damages were awarded than those prescribed by the general rule established by that code section. If, as the record indicates, Appellee had ceased to manufacture fuel oil after determining that Appellant did definitely intend to repudiate the contract, this would have necessitated a shutdown of Appellee's refinery and would have resulted in enormously greater damages than those which have been awarded [R. 148].

As a matter of fact, the actual loss suffered by Appellee was some $18,000 greater than the amount of the original judgment and hence some $38,000 greater than the amount awarded by the revised judgment [Ex. 52]. In light of this evidence, it is difficult to understand the continued insistence by Appellant that in some manner Appellee received a nebulous "benefit of nonperformance" (Br. 37).

Finally, it may be said that the Appellate Court opinion indicated that it concurred with the trial court in adopting the statutory measure of damages and thus it can make no difference whether Douglas burned the oil (some of which it had to do because of the lack of any available market), or made no resale at all (See *Ventura Refining Co. v. Roseberg Oil Co.*, 82

Cal. App. 648, 653, 256 Pac. 434: ". . . a resale by the seller is not a necessary prerequisite to the maintenance of an action for damages in which the difference between the contract price and the market price is the measure of the detriment."), or resold the oil at less than the market or at more than the market. *Banks v. Pann,* 82 Cal. App. 20, 24, 254 Pac. 937, where it is stated:

> "Whatever may be contended with reference to the general rule that one is bound to use all reasonable means at hand to minimize his damage, it is rarely applied in cases of this sort where the measure of damages is provided by statute. Here the seller's damage was determined at the time of breach."

4. The Findings of the Trial Court Upon Which Its Computation of Damages Was Based, Are Fully Supported by the Evidence.

Findings of fact of the trial court are not to be set aside unless clearly erroneous (Rule 52(a)). Upon appeal the findings of the trial court, if supported or sustained by competent evidence, will not be interfered with or disturbed by the Appellate Court. (*De Lavall Steam Turbine Co. v. United States* (1931), 284 U. S. 61; *Memphis & CR Co. v. Pace* (1930), 282 U. S. 241; *Halsell v. Renfrow* (1906), 202 U. S. 287).

The necessary findings of both contract price and market price for the months of March, April and May were duly made by the court in its original findings and these findings were not vacated or disturbed in any manner on the first appeal. Hence the sufficiency of the evidence to support these findings cannot be now questioned.

The contract price (a delivered price) was established by the contract at a fixed figure subject to adjustment upward or downward in the same amount as any change in the posted price of Standard Oil Company for Bunker fuel at El Segundo, California and to similar adjustment with respect to changes in the specified transportation tariff which was set out in the contract. During the course of the contract there were two changes in the Standard Oil posting, each being in the amount of a 20 cent per barrel reduction, and occurring on January 10, 1958 and April 14, 1958 [Ex. 54]. The transportation factor set forth in the contract was deducted by the court from the contract price in arriving at the net f.o.b. refinery contract price. Appellant now questions the propriety of the court's determination in this respect, although it did not question the original findings as to contract price which were computed in the same manner. It now asserts, contrary to the position it took at the trial, that delivery of the product in Douglas equipment would have been more costly than the transportation factor set out in the contract, and hence, the net f.o.b. contract price should be less than the court had determined. The trial court, on conflicting evidence, found it unnecessary to resolve this issue as to actual transportation costs in Douglas equipment, and determined that the established tariff set out in the contract, which at least impliedly was agreed upon by the parties, was a proper transportation factor to be used in arriving at the net contract price. The contract price [as set out in Exhibit 63] apparently was considered as accurate by Appellant, since it used these figures in its illustrative computations in its Points and Authorities accompany-

ing its motion to reopen the case [Clk. Tr. 27]. Under the circumstances it cannot be considered that Appellant seriously questions the findings as to the contract price for the months prior to March, 1958.

The other factor for the determination of damages is the market value of the defaulted oil during the months of October-February. Extensive evidence was offered by Appellant with respect to the market value of oil during October and November, 1957, which evidence was summarized in defendant's Exhibit R-B. This summary showed an average of $2.77 per barrel for October and $2.74 per barrel for November. The court found the market value for these two months to be $2.75 per barrel. This finding is certainly supported by the evidence.

With respect to the months of December, 1957 and January and February, 1958 ample and sufficient evidence was introduced at the hearings during the original trial. A summary of this evidence is shown in Appellant's opening brief on the original appeal (page 12 of the appendix) which tabulation is, however, subject to the correction noted by Appellant in its brief on the original appeal (pp. 39-40). The findings of the court as to market value for these months are well above the lowest sales prices testified to, and, in regard to the defaulted oil for January and February (Monolith made no oil purchases from others in December), the market values found are even in excess of the prices at which the Appellant itself *actually purchased* substitute oil on the open market, as well as being greatly in excess of the price paid for the same oil by the broker, Mr. Hand, who purchased this oil and *resold*

it to Appellant [R. 435]. In view of this evidence, Appellant's claim that the findings have no support in the evidence is without any substance. It would appear that the most which can be claimed is that there appeared to be some conflict in the evidence as to market values, which was duly resolved by the trial court in its findings.

Appellant further urges that the "posted price" of Standard Oil Company of California should be entitled to great weight in determining market price and that there should be some presumption indulged that the relationship which they claim to have shown to exist during the months of October and November, 1957 between the "posted price" and market value "continues to exist as long as evidence to the contrary is not put forward." In view of the evidence of substantial sales by other producers at less than the "posted price" and the admission by Appellant's own purchasing agent that she obtained substitute oil at prices considerably below this "posted price" [Ex. W], there is in the record ample "evidence to the contrary." It might also be remarked that when the very contract in issue in this case was negotiated, there was a seller's market, as mentioned by this Court in its opinion, and yet the basic contract price was even then less than the "posted price." The efforts of Appellant to attempt to discredit the trial court's findings seem entitled to little notice in view of the fact that the findings were, as to the later months at least, in excess of the price at which Appellant actually purchased oil in substitution for the oil which it was obligated to purchase under the contract. In other words, during a portion of the

contract term, Appellant replaced the defaulted oil by purchases on the open market at prices lower than the market values found by the court for those periods of time.

Conclusion.

It is respectfully submitted that the revised judgment entered by the Court below was entirely in accord with the mandate of this court and that the same should be affirmed in all respects.

GOGGIN, TOLLEFSEN & BUMB,
By R. L. TOLLEFSEN,
ALLEN L. CLEVELAND, JR.,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. Tollefsen